No. 2467

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY (a corporation), and TONOPAH & GOLDFIELD RAILROAD COMPANY (a corporation),

Plaintiffs in Error,

vs.

GOLDFIELD CONSOLIDATED MILLING & TRANSPORTATION COMPANY (a corporation),

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

BROWN & BAER,
Attorneys for Defendant in Error.

CHARLES L. BROWN,
Of Counsel.

PERNAU PUBLISHING COMPANY

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ADDITIONAL STATEMENT OF FACTS.

In addition to the statement of the case as set forth in the brief on behalf of plaintiffs in error, the defendant in error further states, that in addition to finding the rate in question to be an unreasonable one, the Commission further found that the Goldfield Consolidated Milling & Transportation Company was entitled to an award of reparation against the Southern Pacific Company and

the Tonopah & Goldfield Railroad Company in the sum of four hundred and forty-seven ($447) dollars, with interest from November 25, 1910, and directed said railroad companies to pay to the said Goldfield Consolidated Milling & Transportation Company on or before July 1, 1913, said sum of four hundred and forty-seven ($447) dollars, with interest thereon at the rate of six (6%) per cent per annum from November 25, 1910, on the ground that said sum was the excess over and above the rate which the Commission found to be reasonable.

Demand was duly made upon the carriers for the payment of said sum of four hundred and forty-seven ($447) dollars with interest and said demand was refused and thereupon and thereafter and on the 11th day of October, 1913, this proceeding was instituted in the United States District Court for the recovery of said order of reparation as provided by Section 16 of the Interstate Commerce Act.

THE LAW OF THE CASE.

The jurisdictional question suggested in the brief of plaintiffs in error is one upon which the law may be said to be well settled.

In the case of *Cincinnati, H., & D. R. Co. v. Interstate Commerce Commission,* 206 U. S. 142, the Court uses the following language pertinent to the question here presented:

"The statute gives prima facie effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed. See Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 194, 40 L. ed. 935, 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 672, 44 L. ed. 309, 318, 20 Sup. Ct. Rep. 209.

In like manner the same Court has again reviewed this question in *Interstate Commerce Commission v. Union Pacific Railroad Company,* 222 U. S. 541-6, and from the syllabi of this case the following statements are pertinent:

1. The courts will not examine the facts on which the Interstate Commerce Commission based its order reducing rates further than to determine whether there was substantial evidence to sustain the order.

2. An order of the Interstate Commerce Commission reducing rates cannot be said to have been made without substantial evidence to support it, where, although there is no direct testimony that the old rate was unreasonably high, there were facts in evidence from which experts could have named a rate.

5. The Interstate Commerce Commission cannot be said to have ordered a reduction in the rates on lumber because of the effect upon the lumber industry of the carriers' action in advancing the rates, where, although the Commission considered that subject, its opinion, taken as a whole, affirmatively shows that it confined itself to the exercise of its statutory

power to condemn unjust and unreasonable rates and fix reasonable ones.

From the body of the opinion in the above case, after the Court has stated the six propositions bearing upon the question of jurisdiction as suggested on pages 5 and 6 of the opening brief on behalf of plaintiffs in error, and continuing the opinion the Court says:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience,' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scientilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Let us therefore turn to the record of this case as set forth in the transcript for the purpose of determining whether or not there was substantial evidence to sustain the order of the Commission and also the judgment of the trial Court.

Upon the trial below there was introduced in evidence the opinion of the Commission (see pages 40, 41, 42, and 43 of Transcript), and also the order of the Commission (see pages 43, 44 and 45 of Transcript).

The opinion and order of the Commission are under the Commerce Act made *prima facie* evidence of all of the statements therein contained, and when these documents were introduced in evidence in the Court below they constituted, in our judgment, a *prima facie* case. The plaintiff, however, did not rest upon the establishment of its *prima facie* case, but proceeded further and introduced in evidence a statement of the bill of the shipment in question (see page 46 of Transcript), and also a comparative statement of commodity rates on iron or steel window sash from which the discrimination against Goldfield, Nevada, was made apparent (see page 48 of Transcript), and from which, no doubt, the Commission reached its conclusion that the rate under attack was unreasonable.

There was also introduced in evidence a statement showing that steel window sash and wooden window sash as freight were classified identically in certain classification districts of the United States, and, in fact, the entire United States except Pacific Coast Territory (see page 49, Transcript), and from this Exhibit the Commission was justified in its conclusion that the rate under attack was unreasonable, arising also from the wrongful classification in the Pacific Coast Territory.

Again there was also introduced in evidence a typewritten statement of the case (see pages 50, 51 and 52 of Transcript) fully stating the position of the claimants in its attack upon the unreasonableness of the rate in question and giving the various tariff references and per cent per ton per mile earnings to further aid the Commission in arriving at its conclusion that the rate under attack was an unreasonable one.

All of these documents were again introduced in evidence and presented to the trial Court upon the hearing of this question in that tribunal and in addition there was also introduced in evidence the transcript of the testimony of the trial before the Commission.

From all of this evidence the defendant in error asserts that there was sufficient evidence before the Commission to justify and support the findings and opinion of the Commission and in like manner the findings and opinion of the trial Court upon which its judgment rests and we submit that from the facts in evidence experts could have named a reasonable rate, as did the Commission, and in like manner, experts could have found the rate under attack to have been unreasonable, as did the Commission.

The plaintiffs in error except to the order of the Court overruling their demurrer to the complaint in the lower Court and they again except to the conclusions and judgment of the Court, and these points are considered together under the charge that the plaintiff failed to allege or prove damage.

The defendant in error asserts that there was full and complete allegation of damage and also full and complete proof of damage, both before the Commission and before the trial Court. In support of this assertion the allegation of damage is fully set forth in paragraphs IV, V and VI of the complaint and as a copy of the findings and order of the Commission are referred to in paragraph V of the complaint and duly attached thereto under mark of Exhibit "A", we submit that the same should be read in connection with the allegations of the complaint, and we therefore find the allegation

> "That complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at a combination through rate of $1.95 per hundred pounds, made up of $1.30 to Sacramento, Cal., and 65¢ beyond, and that complainant is therefore entitled to an award of reparation against the Southern Pacific Company and Tonopah & Goldfield Railroad Company in the sum of $447.00 with interest from November 25, 1910."

We therefore submit that the demurrer was properly overruled by the trial Court.

As these matters were again proven upon the trial of the case and established by the evidence as heretofore shown by the introduction of the order and decision of the Commission and by the introduction of the transcript of the proceedings before the Commission, together with all of the exhibits introduced before and received by the Commission, we submit that the proof is ample and complete that there was

damage suffered by the plaintiff below as a result of the unreasonable charges made by the carriers and the exaction of the same by the carriers from the plaintiff below as an unreasonable freight charge upon its steel window sash after the haul had been made. We suggest that all that is necessary is to now call the attention of this Court to the fact that the finding upon this point is made in favor of the plaintiff below by the trial Court, and when it is shown that there was evidence for such finding and the judgment of the Court that this Court should not disturb such finding and judgment, but should allow it to remain as a settled question of fact in the case.

This brings us to the case of *Illinois Central Railroad Company etc. v. Interstate Commerce Commission,* 206 U. S. 441, and quoting from the last paragraph of the able opinion the language of the Court is much in point here.

> "It is true, appellants assert, that clear and unmistakable error has been committed, but upon ground untenable, as we have seen. And the present case, above all others, calls for the application of the rule. The question submitted to the Commission, as we have said, with tiresome repetition, perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting, and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended

for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact, and not of law. It seems from the findings, report, and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

Further testimony was taken by the circuit court and its judgment confirmed that of the Commission and approved its order. Decree affirmed."

Having fully answered the points suggested by the plaintiffs in error in their opening brief, and having cited the cases containing the law which in our judgment determines this case, the defendant in error respectfully submits that the judgment of the lower Court should be affirmed.

Dated, San Francisco,
November 9, 1914.

BROWN & BAER,
Attorneys for Defendant in Error.

CHARLES L. BROWN,
Of Counsel.